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Supreme Court of the United States

OCTOBER TERM, 1972

NO. 71-1313

DR. ROBERT E. HAM, ET AL, *Petitioners*

v.

GEORGE ROMNEY, ET AL, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions to be Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Prayer	7
Certificate of Service	8
Appendix A	9
Appendix B	11
Appendix C	14

LIST OF AUTHORITIES

CASES

	Page
Eisen v. Carlisle In Jacqueline, 391 F.2d 555, 563 (2nd Cir. 1968)	5

UNITED STATES STATUTES

12 U.S.C. §1702	2, 6
12 U.S.C. §1715z-1	6
12 U.S.C. §1715 2-1	2
18 U.S.C. §1331	2, 4
28 U.S.C. §1254(1)	2, 4

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23 (b) (2)	2, 4, 5, 6

TEXT

Wright; Class Actions, 47 FRD 169, 184 (1969)	6

Supreme Court of the United States

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Judges Of The Court:

Petitioners, DR. ROBERT E. HAM and wife, LOIS HAM; A. G. FOWLER, JR.; PETER B. REA; WELDON CHOLLETT; LAWRENCE ENNIS; and MEADOW-CREEK VILLAGE CIVIC CLUB, and in behalf of themselves and all residents, taxpayers, property owners, and persons similarly situated in Meadowcreek division or subdivision, pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on January 11, 1972.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas, and the opinion of the Court of Appeals for the Fifth Circuit are printed in Appendix "A" and Appendix "B" hereto, along with the denial of the Petition For Rehearing as Appendix "C". The case was No. 71-2871 in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 13, 1971, Petition For Rehearing was denied on January 11, 1972. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS TO BE PRESENTED

Whether this class action is a true class action and therefore allowed to aggregate its claim to meet the amount in controversy requirement for Federal Jurisdiction.

STATUTES INVOLVED

The Federal Rules of Civil Procedure Rule 23 (b) (2) Title 18 U.S.C., Section 1331 of United States Code and Title 12 U.S.C. §1715 2-1 and 12 U.S.C. §1702 of the United States Code concerning the Banks and Banking Laws of the United States.

STATEMENT OF THE CASE

The Petitioners in this class action are all the residents of the Meadowcreek Subdivision of Houston, Harris County, Texas. The Meadowcreek Subdivision is located

in Southeast Houston near Pasadena and is comprised of 1,200 homes housing approximately 4,800 people. The Meadowcreek Village Civic Club is an organization comprised of the residents of the Meadowcreek Subdivision. The civic club operates on a representative structure with various areas within the subdivision divided up into sections. Each section has a leader who is responsible for the representation of the homes located within his designated section. The named Petitioner, LAWRENCE ENNIS, is president of the Meadowcreek Village Civic Club and the other Petitioners, namely DR. ROBERT E. HAM, MR. A. G. FOWLER, JR., MR. PETER B. REA, and MR. WELDON CHOLLETT, are the section leaders. MRS. LOIS HAM, also a named Petitioner, is the chairman of the women's division. It is quite evident that the Meadowcreek Village Civic Club is a well organized highly representative functioning group of residents who are actively concerned with the well being of their neighborhood. The Respondents are the ALLENDALE VILLAGE, which is an unincorporated association formed with the specific purpose of purchasing property at 6005 Allendale Road in Harris County, Texas, for the construction of a multi-unit housing project. Funding for the apartment project was made available by the HOME SAVINGS ASSOCIATION with the FEDERAL HOUSING ADMINISTRATION insuring the loan, and under the Banks and Banking Laws of the United States, namely Title 12, Section 1715z-1 of the United States Code (Supp. 1969), the FEDERAL HOUSING ADMINISTRATION agreed to subsidize seven and one-half (7-½%) percent of the total eight and one-half (8-½%) percent interest rate. This type of arrangement is commonly called a Section 236 Project. A building permit was secured from

the CITY OF HOUSTON, and the contractor, SAM KNIGHTON, was hired by ALLENDALE VILLAGE to construct the project on the site. Upon learning of the project, Petitioners immediately voiced concern to the proper administrative agencies, namely the FEDERAL HOUSING ADMINISTRATION, the U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and the CITY OF HOUSTON. At each administrative agency, they were told that either it was too late or nothing could be done. Petitioners feeling that they have several equitable complaints about the project, have thus been forced to the recourse of pursuing an action in the Federal Courts. The suit having been filed in Federal Court in the Southern District of Texas, was dismissed on a jurisdictional question arising out of the failure to meet the jurisdictional amount of TEN THOUSAND ($10,000.00) DOLLARS. It is the question of the $10,000.00 in regards to a class action type of suit that is the subject of this appeal.

REASONS FOR GRANTING THE WRIT

(1) This is a true class action under Rule 23 (b) (2) Federal Rules of Civil Procedure, and as such the class should be able to aggregate its claim to reach the required Constitutional amount.

A class action is allowed to aggregate its claim to reach the minimum amount requirement under 18 U.S.C., §1331. This was allowed when it was a true class action under the old Rule 23. In 1966, Rule 23 was changed and the advisory committee in Advisory Note, 39 Federal Rules Procedure at 99 said, "the amended rule describes in more practical terms the occasions for maintaining class

actions, provides that all class actions maintained to the end as such will result in judgment including those whom the Court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions".

Your Petitioners feeling that the obvious purpose of the Rule change is to eradicate the traditional and unsatisfactory categories of "true", "hybrid" and "spurious" actions and to make the class action binding upon all members of the class. If this purpose of the Rule is to be achieved, it must necessarily follow that the amount in controversy in a class action be measured by the totality of the claims involved.

The second circuit has emphatically proclaimed that one of the primary functions of the class suit is to provide a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. (*Eisen v. Carlisle In Jacquelin*, 391 F.2d 555, 563 (2nd Cir. 1968)). Therefore, under revised Rule 23, the doors of the Federal Courts should not be closed against cases which involve very substantial amounts of money simply because the individual claimants may have less than the jurisdictional amount at stake. Consequently, a denial of Federal jurisdiction might well mean that a gross wrong involving many thousands of dollars would go undressed because no individual Plaintiff would have sufficient financial stake to justify the payment of filing a fee, let alone the employment of counsel.

Viewed in this light, each action is designed to adjudicate the totality of the rights of the members of the class.

Consequently amount in controversy should and must be determined by the totality of the claims to be adjudicated. The word, "aggregation" is thus probably a misnomer. The "amount in controversy" in any class action sought to be introduced in the Federal Court system should be determined in a manner that defers to reality—by the total amount of the right which will be adjudicated in the case. Petitioners, plead that the answer was suggested by Professor Wright, to provide that "In any class action under amended Rule 23, the aggregate claims for or against all members of the class shall be regarded as a matter in controversy" Wright; Class Actions, 47 FRD 169, 184 (1969).

Section 236 projects that are authorized under 12 U.S.C. §1715z-1 provide for rental and cooperative housing for low and moderate income families. No specific approval of the local government is required for a 236 project. The sponsor provides the permits, with no hearing, and after these are obtained, only the "secretary" has a say in the halting or approving of the interest reducing payments. Your petitioners represent the residents of the Meadowcreek area. This area is notorious for poor sewerage. Under Section 236 the facilities such as water and sewerage must be adequate. Your petitioners, seek to enjoin further construction that would place even more strain upon the existing poor sewer lines. These persons feel that they have a common desire and a common need that can be redressed by the Secretary under his ability to be sued (12 U.S.C. § 1702) to right this wrong. These permits should never have been issued and no further ones should be allowed. Your Petitioners, wish to envoke the jurisdiction of the Courts of the United States to hear

their case and argument and thus grant them a right to a trial upon the merits.

PRAYER

Petitioners pray that the Court issue the Writ of Certiorari and reverse the judgment of the Court of Appeals and determine there was jurisdiction in the hands of the District Court to hear their case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit was made by mail to the following:

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PHILLIP L. CYPHERS

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION No. 71-H-121

ROBERT E. HAM, ET AL.,
Plaintiffs,

v.

GEORGE ROMNEY, SECRETARY OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Defendants.

(Filed August 9, 1971)

JUDGMENT

This action having come on for hearing before the Court, and the issués having been duly heard and it appearing that the motion of defendants to dismiss for want of jurisriction should be granted,

It is ordered and Adjudged that the plaintiffs take nothing, that the action be dismissed, and that the defendants, George Rommey, Secretary of the United States Department of Housing and Urban Development, et al., recover of the plaintiffs, Robert E. Ham, et al., their costs of action.

The Clerk shall file this judgment and send copies to counsel of record.

Done at Houston, Texas, this 9th day of August, 1971.

JAMES NOEL
Judge

APPENDIX B

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2871
Summary Calendar

D. C. Docket No. 71-H-121
DR. ROBERT E. HAM, ET AL.,
Plaintiffs-Appellants,

versus

GEORGE ROMNEY, Secretary of United States Department of Housing and Urban Development, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

December 13, 1971

Issued As Mandate: January 19, 1972

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2871
Summary Calendar*

DR. ROBERT E. HAM, ET AL.,
Plaintiffs-Appellants,

versus

GEORGE ROMNEY, Secretary of United States Department of Housing and Urban Development, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(December 13, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2871
Summary Calendar*

DR. ROBERT E. HAM, ET AL.,
Plaintiffs-Appellants,

versus

GEORGE ROMNEY, Secretary of United States Department of Housing and Urban Development, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(January 11, 1972)

ON PETITION FOR REHEARING

Before: Gewin, Goldberg and Dyer, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

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Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1313

DR. ROBERT E. HAM, ET AL, *Petitioners*

v.

GEORGE ROMNEY, ET AL, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CITY OF HOUSTON, TEXAS, IN OPPOSITION

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INDEX

	Page
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Brief of the Argument	
Question 1 (Aggregation under Rule 23)	3
Question 2 (State law bases for result)	6
Prayer	12
Certificate of Service	13

LIST OF AUTHORITIES

CASES	Page
Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724 (U.S.C.A., 5th Cir. 1962)	4, 5
Burnett v. Short, 441 F.2d 405 (U.S.C.A., 5th Cir. 1971)	7
City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872 (Tex. Sup. 1937)	9
City of Houston v. George, ____ S.W.2d ____, (Tex. Sup. March 22, 1972)	10
Ellis v. City of West University Place, 141 Tex. 608, 175 S.W.2d 396 (Tex. Sup. 1943)	11
Erie Ry. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938)	9
Hadnott v. City of Prattville, 309 F.Supp. 967 (U.S.D.C., M.D., Ala. 1970)	7
Hall v. Garson, 430 F.2d 430 (U.S.C.A., 5th Cir. 1970)	7
Hawkins v. Town of Shaw, Miss., 438 F.2d 1286 (U.S.C.A., 5th Cir. 1971)	7, 8
Helvering v. Gowan, 302 U.S. 238, 58 S.Ct. 154 (1937)	8
Kirschke v. City of Houston, 330 S.W.2d 629 (Tex. Civ. App. 1959, error ref. n.r.e., appeal denied, 364 U.S. 474, 81 S.Ct. 242 [1960])	8, 9, 10
Little v. Schafer, 419 F.Supp. 190 (U.S.D.C., S.D., Tex. 1970)	10

CASES	Page
Lum Wan v. Esperdy, 321 F.2d 123 (U.S.C.A., 2nd Cir. 1963)	7
Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940 (1971)	7-8
Pinel v. Pinel, 240 U.S. 594, 36 S.Ct. 416 (1916)	4
Rodriquez v. Medical Arts Hospital, 437 F.2d 1023 (U.S. C.A., 5th Cir. 1971)	9
Schulman v. City of Houston, 406 S.W.2d 219 (Tex. Civ. App. 1966, error ref. per curiam, 412 S.W.2d 34 [1967])	10
Securities and Exchange Commission v. Chenery Corp., 317 U.S. 80, 63 S.Ct. 454 (1943)	7
Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053 (1969)	2, 5-6
Tompkins v. City of El Paso, 449 F.2d 842 (U.S.C.A., 5th Cir. 1971)	10

STATUTES AND RULES

28 U.S.C.A. §1954(1)	2
42 U.S.C.A. §1331	2, 6
42 U.S.C.A. §1983	7
42 U.S.C.A. §1985	7
Federal Rules of Civil Procedure for the United States District Courts,	
Rule 23	4, 5
Rule 82	6
Revised Rules of the Supreme Court of the United States,	
Rule 19	2

OTHER AUTHORITIES

McQuillin, *The Law of Municipal Corporations* (3rd Ed.)	8

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1313

DR. ROBERT E. HAM, ET AL, *Petitioners*

v.

GEORGE ROMNEY, ET AL, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT, CITY OF HOUSTON, TEXAS, IN OPPOSITION

To The Honorable Supreme Court Of The United States:

Comes now the City of Houston, Texas, a respondent herein, and files this, its brief in opposition to Petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and would show the Court:

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C.A. §1954(1). However, this Respondent questions whether Petitioners have met the jurisdictional requirement guidelines for Writs of Certiorari imposed by Rule 19, *Revised Rules of the Supreme Court of the United States,* in that this Court, in *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053 (1969), has held contrary to Petitioners' contentions here postulated.

QUESTIONS PRESENTED

I.

Whether the claims of individual land owners for damages to their real estate alleged to have resulted from certain actions and threatened actions of the various Respondents here can be aggregated to satisfy the jurisdictional sum of $10,000 required by 42 U.S.C.A. §1331, when no one member of the class Petitioners seek to create is alleged to have suffered damages in the jurisdictional amount.

II.

Notwithstanding the issue of jurisdiction, insofar as Respondent, City of Houston, is concerned, whether the judgments of the District Court and Court of Appeals were correct because Petitioner stated no claim upon which the United States District Court could grant relief against said City.

STATEMENT OF THE CASE

The Petitioners here seek to create a Rule 23 "class" out of the homeowners in a residential subdivision, alleg-

ing that, "collectively," they have been injured, through diminution in the value of their homes, in the amount of $1,200,000.00, "calculated at $1,000 per home," all as the result of the construction of a so-called "Section 236" project, for which the Respondent, City of Houston, had issued building permits.

In addition, as against Respondent, City of Houston, Petitioners prayed that it "be ordered to provide better sewage to accommodate the present 96 units and other inhabitants in that area, and that the . . . City of Houston be enjoined and restrained from issuing any further building permits to any individual, corporation, association, or person for construction of any apartments in the area of Meadowcreek Village and in particular, for units built under what is commonly [called] a 236 project."

BRIEF OF THE ARGUMENT

QUESTION I
(Restated)

Whether the claims of individual land owners for damages to their real estate alleged to have resulted from certain actions and threatened actions of the various Respondents here can be aggregated to satisfy the jurisdictional sum of $10,000 required by 42 U.S.C.A. §1331, when no one member of the class Petitioners seek to create is alleged to have suffered damages in the jurisdictional amount.

* * *

On all fours with the question here presented is *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724

(U.S.C.A., 5th Cir. 1962). There, a group of property owners alleged their homes were damaged because of nuisances, so-called, generated by the airport in question which was located near their homes. They sought to create federal jurisdiction by calling themselves a "class" under Rule 23 (before amendment) and alleged each member of this "class" suffered damage "in excess of $4,000", and that the combined sum of all their damages exceeded the necessary $10,000 jurisdictional amount. The Court of Appeals held that the claims of the individual home owners were separate and distinct and, citing the leading case of *Pinel v. Pinel,* 240 U.S. 594, 36 S.Ct. 416 (1916), said:

> "Assuming that this is a class action properly brought under Rule 23(a) (3), it is still requisite, if the claims of the plaintiffs be separate and distinct, that each must allege the jurisdictional amount." (308 F.2d 726)

The Court determined that the claims of the individual home owners were "separate and distinct", ergo, no class action would be maintainable without each claiming the jurisdictional amount.

In the case at bar, as was the situation in *Alfonso,* the claims of the various "class members" are also separate and distinct. Assuming, arguendo, the activities of Respondents, or any of them, actually damaged Petitioner Ham's property in the sum of $1,000, it would not follow that Class member John Doe's property would be equally damaged, nor would he and Ham have any interest or right to share in each other's recovery. Likewise, each would have the burden of showing the amount his own particular property was "damaged" (reduced in market

value) by the nuisance in question. If *Alfonso* is still the rule of decision in cases such as that at bar, Petitioners cannot prevail.

In 1966, however, and subsequent to *Alfonso,* Rule 23 was amended; thereby, Petitioners claim, the teachings of that case have been rendered inapposite. By such a position, they perforce have not acknowledged the very recent holding of this Court in *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053 (1969), in which the question of aggregation was reconsidered in the frame of reference presented by that amendment to Rule 23:

> "The issue presented by these two cases [covered by the one opinion in Synder] is whether separate and distinct claims presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy." (394 U.S. 333, 89 S.Ct. 1055)

Again aggregation in the manner here sought by Petitioners was disallowed. The Court discussed the 1966 amendment which, it said, sought to replace the old categories of class actions, i.e., "true", "hybrid", and "spurious", with a "functional approach" to class actions. However, insofar as the question of whether the amendment would permit aggregation of claims to attain the jurisdictional amount, the Court held that such jurisdictional *"amount in controversy"* is set by the Congress, not by a Rule of Civil Procedure:

> "The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or any rule of

> procedure.[1] That doctrine is based rather upon this Court's interpretation of the statutory phrase 'matter in controversy'." (394 U.S. 336, 89 S.Ct. 1057)

Since this Court has so recently considered the question presented by the case at bar, and has held adversely to Petitioners' position, it is felt that it would impose upon the time of a busy Court further to belabor the question. Consequently, based upon the teachings of *Snyder*, Respondent, City of Houston, respectfully submits that since none of the Petitioners has alleged damages within the jurisdictional amount required by 28 U.S.C.A. § 1331, the District Court below properly held that it did not have jurisdiction of the controversy.

II.

Notwithstanding the issue of jurisdiction, insofar as Respondent, City of Houston, is concerned, whether the judgments of the District Court and Court of Appeals were correct because Petitioner stated no claim upon which the United States District Court could grant relief against said City.

* * *

The District Court's judgment should be affirmed if the decision is correct, even though, arguendo, wrong reasons are given for the holding. In other words, assuming, without agreeing, that the District Court's rationale be incorrect and the various claims can be aggregated to a

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1. Indeed, as the Supreme Court itself pointed out, Rule 82 provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts." (394 U.S. 337, 89 S.Ct. 1057). Is not Rule 82 of equal dignity with Rule 23?

figure in excess of $10,000.00, nonetheless, if there are other valid bases upon which the result reached by the District Court can be bottomed, the judgment in favor of Respondent City, at least, should be affirmed notwithstanding. *Helvering v. Gowan*, 302 U.S. 238, 245, 58 S.Ct. 154, 158 (1937); *Securities and Exchange Commission v. Chenery Corp.*, 317 U.S. 80, 88, 63 S.Ct. 454, 459 (1943); *Lum Wan v. Esperdy*, 321 F.2d 123, 125-126 (U.S.C.A., 2nd Cir., 1963). There are such valid bases here, as no claim has been put forth upon which relief could be granted against the City in a federal court, class action or not.

If not actually controlling, *it is persuasively significant* that 42 U.S.C.A. §§ 1983, 1985, were not invoked for jurisdictional purposes, and that no violation of "civil rights" has been alleged,[2] nor has any allegation of racial bias, invidious or otherwise, been charged against the City, nor any discrimination due to sex, poverty, or that the geographical area in question qualified as a "ghetto", so-called.[3] Hence, there is nothing about the City's acts,

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2. 42 U.S.C.A. §§1983, 1985 provide a remedy *exclusive* of any by state law. *Hall v. Garson*, 430 F.2d 430 (U.S.C.A., 5th Cir. 1970); Also, *Burnett v. Short*, 441 F.2d 405 (U.S.C.A., 5th Cir. 1971). Hence, an invocation of those statutes would have cast Petitioners loose from dependence upon state remedies which this Respondent proposes to show are unavailable to Petitioners under the state of their pleadings.

3. Making the fact situation here different from that before the Fifth Circuit, in *Hawkins v. Town of Shaw, Miss.*, 437 F.2d 1286 (U.S.C.A., 5th Cir., 1971), where the Court ordered a city to "submit a plan for the Court's approval detailing how it proposes to cure the results of the *long history of discrimination* which the record reveals." (437 F.2d 1293, emphasis added). The situation at bar is also distinguishable, for like reasons, from *Hadnott v. City of Prattville*, 309 F.Supp. 967 (U.S.D.C., M.D., Ala. 1970). Compare, however, *Hawkins* with *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940 (1971) where the Supreme Court refused to overturn the action of

complained of, to make them "*suspect*" so as to put the City under a greater burden than that imposed upon an ordinary defendant. Concomitantly, federal cases treating of municipal services, or the lack of adequacy thereof, should be reviewed with the foregoing in mind.

In *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex. Civ. App. 1959, error ref. n.r.e., appeal denied, 364 U.S. 474, 81 S.Ct. 242 [1960]), Kirschke sued the City for damages alleged to have been sustained as a result of the City allegedly wrongfully withholding a building permit. The Texas Court denied him any relief, reciting as a reason therefor the following quotation from McQuillin, *The Law of Municipal Corporations*, (3rd Ed.), § 26.98:

> "No cause of action for damages against a city or its officers can arise from the grant or denial of a license or permit or from any action or omission with respect thereto, since the issuance of a license or permit is a governmental function." (330 S.W.2d 633).

Certiorari was sought but the U. S. Supreme Court held, per curiam:

> "The appeal herein is dismissed for the reason that the judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a nonfederal ground adequate to support it." (364 U.S. 474, 81 S.Ct. 242).

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the city in closing all its municipally owned swimming pools, thereby denying both races public swimming facilities. A distinction might be made in the fact that, as Mr. Justice Blackmun pointed out in his concurring opinion, swimming pools "are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." (91 S.Ct. 1947) On the other hand, indoor plumbing, one of the several city services treated in *Hawkins*, has passed beyond the novelty or luxury stage.

As to Respondent, City of Houston, the case at bar concerns the propriety *vel non* of issuing a building permit and/or whether or not, and if so, where and how, to construct a sanitary sewer—all matters clearly within the constitutionally contemplated and permissible ambit of the local police power (as will be more particularly discussed below), thus there is no significant distinction between *Kirschke* and the case at bar insofar as the question of state *vis-vis* federal jurisdiction is concerned. It is submitted, therefore, that under the doctrine of *Erie Ry. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, (1938), Texas law should govern.

The Petitioners cannot prevail under the laws of Texas can be demonstrated in the following outline:[4]

A. In Texas, a municipality is immune from liability to respond in damages for negligence of omission or commission in the performance of a governmental, as distinguished from a proprietary, function. *City of Dallas v. Smith*, 130 Tex. 225, 107 S.W.2d 872 (Tex. Sup. 1937). "Governmental immunity is a viable legal principle in Texas," *Rodriquez v. Medical Arts Hospital*, 437 F.2d 1023, 1024 (U.S.C.A., 5th Cir. 1971), and has but recently been reaffirmed by the Supreme Court of Texas. *City of Houston v. George*, ____S.W.2d____ (Tex. Sup., March 22, 1972).[5]

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4. "It is our view that a federal district court in an Erie case may, in making a vicarious determination of state law, base its conclusion upon all relevant sources to which the state courts would themselves look." *Tompkins v. City of El Paso*, 449 F.2d 842, 844 (U.S., C.A. 5th Cir. 1971).

5. "This is not to say that the federal courts cannot be innovative or impart new direction to state law in diversity cases, rather

B. The furnishing of sanitary sewerage facilities, as well as the act of constructing sewage disposal plants, are such immune governmental functions. *Gotcher v. City of Farmersville,* 137 Tex. 12, 151 S.W.2d 565 (Tex. Sup. 1941); *Bowie v. City of Houston,* 259 S.W.2d 765 (Tex. Civ. App. 1953, error ref. n.r.e., per curiam, 152 Tex. 533, 261 S.W.2d 450 [1953]); *City of Houston v. George,* ____S.W.2d ____ (Tex. Sup., March 22, 1972).

C. The granting or refusing of a buliding permit is also an immune governmental function of a municipality. *Kirschke v. City of Houston,* 330 S.W.2d 626 (Tex. Civ. App. 1959, error ref. n.r.e., appeal denied, 364 U.S. 474, 81 S.Ct. 242 [1960]), discussed above.

D. A municipality, not being liable in damages for the foregoing, *a fortiori,* it cannot be enjoined from

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the converse is true. It is, however, improper for the federal courts to disregard the forum state's jurisprudence on the subject of sovereign immunity, especially where that jurisprudence does not evidence a trend toward the position [i.e., toward abrogating the doctrine] taken by the district court.

"The Texas courts have by no means been consistent in their development of the Texas law of sovereign immunity. They have, however, evidenced no indication of an intention to abolish the rule, if indeed a judicial fiat could abolish sovereign immunity in Texas." *Tompkins v. City of El Paso,* 449 F.2d 842, 844 (U.S., C.A. 5th Cir. 1971, parenthetical matter added).

See also: *Little v. Schafer,* 319 F.Supp. 190 (U.S.D.C., S.D. Tex. 1970), wherein, referring to the Courts of Texas, Judge Seals said:

"In their continuing deference to legislative wisdom, those bodies long refused to abrogate the judicially created doctrine of sovereign immunity. Now that the legislature has spoken [by the Texas Tort Claims Act which retained the principle of governmental immunity to all but a few exceptions (none of which are germane here)], *it is inconceivable that the Texas courts will fail to follow the legislators' obvious intent.*" (319 F.Supp. 192, emphasis and parenthetical matter added).

> construing, or mandamused to construct, sewage disposal facilities. *Schulman v. City of Houston,* 406 S.W.2d 219 (Tex. Civ. App. 1966, error ref. n.r.e., per curiam, 412 S.W.2d 219 (Tex. Civ. App. 1966, error ref. n.r.e., per curiam, 412 S.W.2d 34 [1967]).

Very much in point is Ellis v. City of West University Place, 141 Tex. 608, 175 S.W.2d 396 (Tex. Sup. 1943). There, that city, in attempting to enforce its zoning ordinance which was later declared void, had stopped the plaintiff from completing his building for a period of two years. Suit was then brought to collect damages for that delay. The City of West University Place defended upon the theory that its conduct, complained of, was an exercise of its lawful police power, thus a valid governmental function for which it was not liable to respond in damages. The Supreme Court of Texas held for the City, and after reciting that this governmental function was not a "taking" of private property for public use, further stated:

> "The rule of immunity from liability of a city in exercising governmental functions extends to discretionary power and generally there is no liability for damages resulting either from *the failure to exercise, the manner of exercising or for error of judgment in exercising* such discretionary power of a public nature, embracing judicial or legislative function." (175 S.W.2d 398-399, emphasis added).

In the case at bar, if Appellants' pleadings are assumed to be true, the worst that can be said about the City of Houston is that it was guilty of errors of judgment in the exercise of its police power. For this it would be immune as was the City of West University Place in *Ellis,* supra.

It is submitted, therefore, that Petitioners have not alleged a cause of action for which recovery could be had under the laws of Texas.

WHEREFORE, PREMISES CONSIDERED, Respondent, City of Houston, prays that certiorari should in all things be denied; alternatively certiorari should be denied as to it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. Rollins, Senior Assistant City Attorney, for the City of Houston, Texas, and as an attorney of record in subject case, admitted to practice before the Supreme Court of the United States, do hereby certify that two true and correct copies of the foregoing Brief of Respondent, City of Houston, Texas, in Opposition were this 16 day of May, 1972, served upon each counsel of record for the other parties herein, to-wit:

Mr. Phillip L. Cyphers
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by depositing same in the United States mails, postage prepaid, certified mail, return receipt requested.

Joseph G. Rollins

JOSEPH G. ROLLINS

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No. 71-1318

FILED
JUN 8 1972
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In the Supreme Court of the United States

OCTOBER TERM, 1971

DR. ROBERT E. HAM, ET AL., PETITIONERS

v.

GEORGE ROMNEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1313

DR. ROBERT E. HAM, ET AL., PETITIONERS

v.

GEORGE ROMNEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioners brought this class action on behalf of approximately 1,200 homeowners in the Meadowcreek Subdivision of Harris County, Texas. They seek, *inter alia*, to enjoin the Secretary of Housing and Urban Development from providing mortgage insurance with respect to a housing project to be constructed in Harris County. Petitioners allege that, because the existing sewage facilities in Harris County cannot accommodate the requirements of the contemplated project, 12 U.S.C. 1735f prohibits the Secretary from insuring mortgages for the new construction (App., *infra*, p. 4). Petitioners contend that the planned construction would diminish the

value of each homeowner's property by $1,000 (*ibid.*).

Petitioners sought to meet the $10,000 jurisdictional requirement (28 U.S.C. 1331) by aggregating the individual $1,000 claims of each homeowner comprising the affected class. The district court held that aggregation in these circumstances was impermissible, since petitioners had not asserted an undivided interest in a single claim, but rather were seeking to vindicate the separate and independent claims of the homeowners in the affected neighborhood (App., *infra*, pp. 3-7). Accordingly, the court dismissed petitioners' complaint for want of jurisdiction (Pet. App. 9-10). The court of appeals affirmed without opinion (Pet. App. 11-13).

2. The holding below is correct and further review is unwarranted. In *Snyder* v. *Harris*, 394 U.S. 332, this Court held that in class actions brought pursuant to Rule 23(b)(2) Fed.R.Civ.P. separate and distinct claims of the individual members of the class cannot be aggregated to meet the jurisdictional amount required by 28 U.S.C. 1331. In doing so, the Court rejected the contention—also made by petitioners here—that the 1966 amendment to Rule 23 altered this principle (394 U.S. at 338).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 71-H-121

DR. ROBERT E. HAM, and wife, LOIS HAM; A. G. FOWLER, JR.; PETER B. REA; WELDON CHOLLETT; LAWRENCE ENNIS; and MEADOWCREEK VILLAGE CIVIC CLUB, and in behalf of themselves and all residents, taxpayers, property owners, and persons similarly situated in Meadowcreek division or subdivision, PLAINTIFFS

v.

GEORGE ROMNEY, SECRETARY OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; CITY OF HOUSTON; ALLENDALE VILLAGE; and SAM KNIGHTON, DEFENDANTS

MEMORANDUM AND ORDER

This is a class action brought by certain residents of Meadowcreek Village, a residential subdivision of Houston, Texas. Plaintiffs sue in behalf of 4800 inhabitants of that subdivision, seeking broad injunctive relief against several defendants. The action complained of is the construction of a ninety-six unit federally assisted low income housing project of the type authorized by 12 U.S.C. § 1715z-1, commonly known as a "section 236" project. Joined as defendants are: (1) the United States Department of Housing and Urban Development, which approved the mortgage insurance for the project and agreed

to subsidize the debt service; (2) Allendale Village, an unincorporated association which is the project sponsor; (3) the City of Houston, which issued the necessary building permits; (4) Sam Knighton, the contractor. Motions to dismiss, in which all defendants join, have been filed.[1]

In substance, plaintiffs contend that the project was authorized and commenced without due regard to the requirement of 12 U.S.C. § 1735f, which provides that no new construction shall be approved for mortgage insurance unless served by adequate water and sewerage facilities. Asserting that such facilities are inadequate to support the additional burden created by the project, plaintiffs allege that existing businesses, residences, and schools in the community will be injured.

Jurisdiction is predicated upon 28 U.S.C. § 1331 (a), and therein lies the bone of contention. This jurisdictional statute requires, besides a federal question, that the matter in controversy exceed $10,000 in value. To satisfy this requirement, plaintiffs assert that each of 1,200 homes owned by members of the complaining class has been or will be damaged by the sewer overload in an amount of $1,000 per home, thus rendering the aggregate damage of the class well in excess of the jurisdictional amount. Defendants deny that the damages of each class member may be aggregated in this fashion.[2] The Court must agree with the latter view.

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[1] Also joined under misnomer in the original complaint was the lender, Home Savings Association. Although deleted from the amended complaint, this defendant joins the motion to dismiss, and the Court's action on same shall be deemed effective as to Home Savings.

[2] Defendants also assert that plaintiffs are without standing to bring this suit. Although there is some question that

The controlling case from this Circuit is *Alfonso* v. *Hillsborough County Aviation Authority*, 308 F.2d 724 (5th Cir. 1962), which involved a class action brought by approximately two hundred homeowners to enjoin the use of a neighboring airport. The complaint alleged that, by reason of low-flying aircraft, certain members of the class had suffered damage to their homes in excess of $4,000 each, and that others had been damaged in unspecified amounts. In holding that these were separate and distinct claims which could not be aggregated for the purpose of jurisdictional amount, the Court quoted the classic formulation of the rule from *Pinel* v. *Pinel*, 240 U.S. 594, 596 (1916):

> The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.

Although the suit in *Alfonso* was a "spurious" class action for the purposes of old Rule 23(a)(3), the holding on the point of impermissible aggregation retains its vitality despite the 1966 revision of Rule 23. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Alvarez* v. *Pan American Life Insurance Company*, 375 F.2d 994 (5th Cir. 1967), cert. denied 389 U.S.

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plaintiffs' grievances are within the zone of interests to be protected or regulated by the National Housing Act, cf. *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), it is unnecessary to reach the question of justiciability.

827 (1967); see Annot., *Class Actions—Jurisdictional Amount*, ~~3 ALR Fed 32~~ (1970). 3 ALR 3rd 372

Like the homeowners in *Alfonso*, the plaintiffs in the instant case proceed as a class, but assert separate and distinct claims of damage to their various properties. Despite common questions of fact and law, the interests to be protected appear to arise only from the status of plaintiffs as homeowners in the affected neighborhood and these interests are otherwise united by no single title or right. Cf. *Potrero Hill Community Action Committee* v. *Housing Authority*, 410 F.2d 974 (9th Cir. 1969). As noted above, none of these individual claims is alleged to exceed $1,000. Aggregation being unavailable, the requisite amount in controversy is not present, and subject matter jurisdiction under 28 U.S.C. § 1331 does not exist.[3]

Accordingly, the motions to dismiss are well taken. Rule 12(b)(1), Fed.R.Civ.P. Leave is hereby granted plaintiffs for a period of thirty (30) days within which to amend their complaint in such fashion as properly to allege the jurisdiction of this Court, failing which plaintiffs' complaint shall be dismissed.

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[3] Defendant makes reference to 12 U.S.C. § 1702. This provision authorizes the Secretary to be sued, but does not create a cause of action nor operate as an independent fount of judisdiction. *Choy* v. *Farragut Gardens*, 131 F.Supp. 609 (S.D. N.Y. 1955); *United States* v. *Holder*, 292 F.Supp. 826 (S.D. Iowa 1968). Neither party relies upon or discusses the possible applicability of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Suffice it to say that the Secretary's assessment of sewerage sufficiency would appear by its nature to be a matter "committed to agency discretion." 5 U.S.C. § 701(a)(2).

The Clerk shall send copies of this Memorandum and Order to counsel.

DONE at Houston, Texas, this 29th day of June, 1971.

/s/ James Noel
Judge

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